IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No. 20050385

North Dakota State Board of Higher Education, doing business as North Dakota State University,	)
Plaintiff/Appellee, and Cross-Appellant,	)
vs.	)
City of Fargo,	)
Defendant/Appellant, and Cross-Appellee.	)

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF CASS COUNTY
EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY CASE NO. 09-02-C-2406
THE HONORABLE DOUGLAS R. HERMAN, PRESIDING

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City of Fargo ("Fargo") submits this reply brief in reply to NDSU's brief and NDSU's Cross-Appeal.

ARGUMENT

I. District Court Erred as a Matter of Law in Granting Partial Summary Judgment in Favor of NDSU on Liability and Causation.

Fargo requests this Court reverse the district court's order granting partial summary judgment because (1) the supporting "evidence" was incompetent; (2) genuine issues of material fact existed; and (3) as a matter of law NDSU's damages were not within the coverage of the indemnity provision.

Rather than focusing on the merits, NDSU claims the first and third arguments were not made to the district court. NDSU's brief p. 18. This contention is not accurate.

A. Fargo objected to NDSU's incompetent "evidence".

NDSU claims the only proper method for objecting to summary judgment evidence is a motion to strike. NDSU's brief pp. 22-23. However, in the Eighth Circuit case cited by NDSU, the court recognized a timely objection *or* motion to strike were appropriate methods for raising defects in Rule 56(e) documents. *See Williams v. Evangelical Retirement Homes*, 594 F.2d 701, 703 (8th Cir. 1979); *see also* 11 James Wm. Moore et al., *Moore's Federal Practice* ¶ 56.14[4][a] (3d ed. 2005) (formal motion to strike not required; timely objection sufficient); *Williston Coop. Credit Union v. Fossum*, 427 N.W.2d 804, 806 (N.D. 1988).

At page 22 n. 5 of its brief, NDSU apparently concedes an objection would suffice, but claims:

> Fargo never asserted anything other than a general reservation, and it never specifically cited "foundational inadequacy."

In fact, Fargo raised "foundational inadequacy" at p. 2 of its April 8, 2004 brief opposing NDSU's motion for summary judgment (Add. 2):

> In addition, Fargo expressly reserves its objections to NDSU's exhibits, including but not limited to, *objections based upon lack of foundation and hearsay*. (emphasis supplied)

(C.R. 21) (Add. 1-16). In addition, at page 3 of Fargo's reply brief dated April 22, 2004 (Add. 19), Fargo objected to the admission of the Ulteig Report on foundational grounds. (C.R. 25) (Add. 17-24).

These objections placed the district court on notice of the incompetency of NDSU's Rule 56 "evidence". Moreover, under Rule 103(d), N.D.R.Evid., the admission of this incompetent evidence is reviewable as affecting Fargo's "substantial rights".

NDSU never argued the competency of its evidence; rather NDSU acknowledged its counsel's affidavit did not attest to any facts, but only "verified" the accurate copying of NDSU's exhibits. NDSU brief p. 22 n. 6. Since this "verification" did not supply the foundational attestation, based on personal knowledge, necessary for the admission of these documents, NDSU in effect concedes the exhibits were not admissible under Rule 56(e), N.D.R.Civ.P.

NDSU next argues the admission of these exhibits was harmless error. This argument ignores the fact that the court's ruling on partial summary judgment included a ruling in NDSU's favor on causation as a matter of law. App. 158-159. The "expert reports" attached to the affidavit of NDSU's counsel were submitted for the purpose of establishing causation. NDSU's brief at pp. 23-24 n. 7. Accordingly, the admission of NDSU's incompetent evidence cannot constitute harmless error.

B. Fargo did not waive its claim that NDSU's damages were not within the coverage of the indemnity provision.

NDSU also claims Fargo never argued to the district court that the damages claimed were not covered because they were not foreseeable or reasonably contemplated. NDSU brief p. 18. In fact, one of Fargo's primary argument for opposing NDSU's motion for summary judgment was that the indemnity provision did not apply to NDSU's damages on non-leasehold property because those damages were not within the parties' intent:

> Nothing in the agreement refers to any purpose or intent by the parties concerning other property owned by NDSU in the area.

(C.R. 21).

Fargo also argued that any damages under the indemnity agreement must have been "foreseeable" or within the parties' reasonable contemplation at the time of contracting. (Tr. 1197-1203). Judge Herman acknowledged Fargo's argument, but rejected it in favor of NDSU's position that all damages were covered, even if not foreseeable:

> The City next argues that as a general matter, damages must be "foreseeable" to be covered under any cause of action, including NDSU's action for indemnification under its 1989 lease agreement. The City cites the wrong statute in this regard. The broad indemnification clause covers damages from any use or condition at the FargoDome, *whether foreseeable or not.*

(App. 187)(emphasis supplied).

The Court's ruling is legally incorrect for the reasons discussed in Fargo's brief at p. 33. Moreover, the legal requirement of "foreseeability" requires damages be foreseen, both as to nature and source. *See Vallejo v. Jamestown College*, 244 N.W.2d 753, 758-59

(N.D. 1976). While the doctrine of foreseeability does not require parties to contemplate the exact sequence of events, it would in this case have required the parties to reasonably anticipate, at the time of contracting, water damage to NDSU's IACC building through a steam tunnel from the FargoDome. Neither the IACC building nor the steam tunnel existed at the time of leasing. Moreover, the events which led to the flooding were so bizarre as to be unforeseeable as a matter of law. The district court erred as a matter of law in concluding all damages were covered – whether foreseeable or not.

NDSU now claims, for the first time, Fargo should be estopped from claiming NDSU's loss was not covered by the indemnification provision. NDSU did not plead estoppel in its complaint as a basis for recovering against Fargo. (C.R. 1). Therefore, NDSU is precluded from raising this issue on appeal. *See Ruud v. Frandson*, 2005 ND 174, ¶10, 704 N.W.2d 852 (merits of unpled and untried theory of estoppel not considered on appeal). Moreover, estoppel is an issue of fact which precludes summary judgment if there are factual disputes. *See Reiger v. Wiedmer*, 531 N.W.2d 308 (N.D. 1995).

II. Issue of Whether the Indemnity Provision Applies to NDSU's Direct Claim is Properly Before this Court.

Fargo did not specifically argue, in responding to NDSU's summary judgment motion, that the indemnify provision did not cover NDSU's direct claim, but only third-party claims. However, Fargo did argue, *citing Bridston v. Dover Corp.*, 352 N.W.2d 194, 196 (N.D. 1984), that NDSU's action for damages was not contemplated by the indemnity provision. Fargo noted the insurance provision only applied to the leased premises, thus evidencing an intent to only cover damages to or on the leased property. On appeal, Fargo takes this argument one step further by *citing Bridston* and also noting

the insurance provision only applied to property and casualty claims on the leased premises and third-party liability claims for negligence. The issue was therefore sufficiently raised.

Moreover, it is a well-recognized rule of jurisprudence that an appellate court has the discretion to consider issues raised for the first time on appeal. As noted in 11 *Moore's Federal Practice* ¶ 56.41[3][c] (3d ed. 2005):

> The rule that an argument not raised in the lower court is waived on appeal is one of discretion, rather than appellate jurisdiction. Appellate courts have carved out two commonly used exceptions to this general rule. The appellate court may consider issues raised for the first time on appeal (1) if the issues solely involve questions of law; or (2) if injustice would result if these arguments were not considered.

See also Roise v. Kurtz, 1998 ND 228, ¶18, 587 N.W.2d 573 (Justice Sandstrom dissenting) (raising an issue in trial court not jurisdictional requirement; exceptions recognized include plain error, issue of law only, or issue decisive of entire controversy). If this issue is deemed to have not been sufficiently raised, it falls squarely within the recognized exceptions as an issue of law dispositive of this proceeding.

NDSU has not credibly refuted the law cited by Fargo to support its argument the indemnity provision does not cover NDSU's losses off the leased premises. Referring to the three cases cited by Fargo – *St. Paul Fire and Marine Ins. Co. v. Amerada Hess Corp.*, 275 N.W.2d 304 (N.D. 1979); *Bridston v. Dover Corp.*, 352 N.W.2d 194 (N.D. 1984); and *Olander Contracting Co. v. Gail Wachter Investments*, 2002 ND 65, 643 N.W.2d 29 - NDSU flippantly asserts without analysis:

> The indemnity provisions in those cases are narrower than the broad indemnity provision here, and, thus, have no bearing on this Court's decision.

NDSU's brief p. 21. NDSU is wrong. For example, in *Olander* the indemnification provision required Olander to indemnify Bismarck for damages "arising out of or in consequence of the performance of this work." *Olander*, 2002 ND 65, ¶14, 643 N.W.2d 29. Nor does NDSU's claim that the indemnity provisions were "narrower" explain the Supreme Court's rulings in *Amerada Hess, Bridston*, and *Olander Contracting*.

There is no language within the indemnification provision or within its corresponding insurance clause which creates an intent to cover direct claims between the parties. As NDSU has acknowledged, the insurance provision covers only property loss to the leased premises and liability claims for negligence. NDSU's brief p. 27. This case is neither.

NDSU also claims *Hoge v. Burleigh Cty. Water Mgmt. Dist.*, 311 N.W.2d 23 (N.D. 1981), supports its argument the indemnity provision applies to NDSU's direct claim because the provisions are "nearly identical." NDSU brief p. 21. As explained in Fargo's brief, the *Hoge* decision came after a trial on the merits, preceded the *Bridston* and *Olander* decisions, and contained very different indemnity language:

> The party of the second part hereby agrees to indemnify and to hold and save the parties of the first part harmless from any and all damages to their lands not conveyed herein in fee arising from the use of the rights, easements and right-of-way herein granted, and agrees to pay any damages which may arise to the parties of the first part's property through the use, occupation and possession of the rights herein granted by the party of the second part.

Id. at 26.

NDSU also cites the Eighth Circuit case of *Litton Microwave Cooking Prods. v. Leviton Mfg. Co.*, 15 F.3rd 790 (8th Cir. 1994) in claiming North Dakota law permits indemnity claims between the contracting parties. NDSU brief p. 20. *Litton* was a

Minnesota case decided under Minnesota law and concerned whether attorney's fees were recoverable in a breach of warranty case.

III. District Court Erred as a Matter of Law in Failing to Apportion NDSU's Damages.

NDSU argues the district court's ruling on damages was not erroneous as a matter of law because the evidence on damages was disputed. NDSU has missed the point by ignoring the district court's factual finding that the water from the FargoDome did not cross the hump into the IACC building before 11:00 a.m. (App. 192). NDSU has not disputed this finding of fact or claimed it was erroneous. Since it is also undisputed that damages to the IACC building occurred before 11:00 a.m., the trial court erred as a matter of law in failing to discuss and apply the doctrine of apportionment under *Restatement (Second) of Torts*, § 433A.

Fargo disagrees with NDSU's position that Fargo bore the burden to prove apportionment. It was always NDSU's burden to prove its damages were caused by a condition of the leased premises. *See Investors Real Estate Trust Properties v. Terra Pacific Midwest, Inc.*, 2004 ND 167, ¶ 9, 686 N.W.2d 140. Moreover, Fargo met any purported burden through its cross-examination of Terry Weiland and the testimony of expert McDonagh who apportioned the water by source. (Tr. 198:14-199:10; Trial Depo. James R. McDonagh 67:24-68:3 (April 22, 2005)).

It is also inappropriate for Fargo to suggest the court determined " NDSU would not have suffered damage without the water from the FargoDome." NDSU brief p. 34, citing App. 184. The court made no such direct finding in its Memorandum Opinion.

The district court neither discussed, applied, nor even rejected the doctrine of apportionment, thus erring as a matter of law.

IV. District Court Did Not Err In Denying Pre-Judgment Interest to NDSU.

It is not without irony that NDSU argues for pre-judgment interest by referring this Court to its Brief in Support of Motion to Amend Order for Judgment (NDSU App. 45-48). In that brief NDSU revealed that prior to commencement of litigation, it had demanded in a June 13, 2001 letter that Fargo pay the "full extent of damage" which it deemed "capable of being made certain 'by calculation in accordance with the proper construction of the contract'". (NDSU App. 47). The figure NDSU demanded in 2001 was not the same figure it sought at trial.[1] In fact, in its complaint, NDSU pled it had "incurred monetary damages in an exact amount to be proven at trial." (C.R. 1)

As is obvious from the trial transcript and the court's orders, this was not a simple case of using mathematics to calculate proposed damages. The district court had to initially decide which of the proposed "damages" of NDSU were caused by tunnel flooding. That was not a fixed number even to NDSU as evidenced by the introductory paragraph of its June 13, 2001 letter. The demand of $3,996,754.76 (deemed to be "certain" in calculation then) was at trial modified to a demand of $3,049,962.35. The trial court next had to determine whether NDSU was entitled to full replacement cost, or whether there should be adjustments for depreciation. This required a weighing of the damage witnesses and evidence presented. The trial court also heard testimony on whether all or some of the expenses allegedly incurred by NDSU were caused by NDSU's own water. Finally the trial court had to decide whether all or some of the damages asserted by NDSU were the result of NDSU's own negligence or failure to

[1]NDSU attached to its counsel's affidavit only the first page of the 2001 letter to Furness. (C.R. 403) (Add. 25-26). NDSU now presents the entire letter to this Court. (NDSU App. 65-68). Its inclusion in the Appendix is improper. Rule 30(a)(1), N.D.R.App.P.

mitigate damages or an Act of God. All of this required evaluation of extensive expert testimony.

NDSU ignores the reality of the trial. The eventual award of damages came only after the resolution of a number of contested factual and legal issues. Moreover, as the court noted "there is a compelling argument that an award of interest would be a windfall to NDSU because a 'great majority of the damages awarded to NDSU' were covered by FEMA." NDSU App. 49. The trial court properly denied NDSU's pre-judgment interest claim.

CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for appellant and cross-appellee City of Fargo in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 28(g), N.D.R.Civ.P., that the above brief was prepared with proportional type face and that the total number of words, excluding words in the table of contents and table of authorities total 2,429.

CONCLUSION

Fargo requests this Court to deny the cross-appeal and reverse the judgment in Fargo's favor, or alternatively, remand the case to the district court.

Dated this 22nd day of March, 2006.

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STATE OF NORTH DAKOTA

DISTRICT COURT

COUNTY OF CASS

EAST CENTRAL JUDICIAL DISTRICT

North Dakota State Board of Higher Education, doing business as North Dakota State University,

Plaintiff,

vs.

City of Fargo,

Defendant.

Court File No: 09-02-C-2406

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendant City of Fargo ("Fargo") submits the following memorandum of law in opposition to the Plaintiff's Motion for Summary Judgment. Plaintiff North Dakota State Board of Higher Education, doing business as North Dakota State University ("NDSU") claims that it is entitled to summary judgment because (1) the lease agreement between Fargo and NDSU requires Fargo to indemnify NDSU for its losses and (2) NDSU is entitled to recovery under the hold harmless clause in the easement between Fargo and NDSU.

In this instance, Fargo requests that NDSU's motion be denied for a number of reasons. First, the plain language of the lease agreement and the easement, when read in their entirety, do not entitle NDSU to recovery. Neither agreement includes property outside of the leased premises, namely then land upon which the FargoDome sits. Second, the indemnity provision of the lease agreement is negated if the loss is caused by the negligence of NDSU. There are genuine issues of material fact with regard to the possible negligence of NDSU and its role in causing the loss. Third, NDSU has failed to demonstrate that there are no genuine issues of material fact with regard to the cause of the loss and in particular, whether the loss was caused